



SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 200

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BEN H. FRANK,

*Petitioner,*

vs.

UNITED STATES.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONER

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The Petitioner was convicted of contempt of court and sentenced to three (3) years and placed on probation.

The court required the Petitioner to report to the probation officer in Tulsa, every Monday; to work regularly at a lawful occupation; when out of work to notify the probation officer; consult him prior to job changes; not to leave the judicial district without permission of the probation officer; notify the probation officer of any change in residence; on the first day of each month, for a period of three

(3) years, to fill out one of the blank report forms and mail or bring same to the probation officers at Oklahoma City, and a failure to comply with any of the terms will be cause for revocation of the probation.

Your Petitioner feels that regardless of the fact that he was placed on probation, his liberty and his freedom have been greatly restrained and restricted and he is in effect confined to the district and may be required to serve three (3) years should he in any wise violate any of the restrictive conditions placed upon him and that the conviction without a jury was unauthorized. He further feels that he would not have been convicted had he been granted his Constitutional Right to a jury trial and would thus have been free of the conviction and the stigma placed upon him by such conviction.

The Solicitor-General in his brief apparently goes upon the theory that because the Petitioner was placed upon probation that this satisfies the Constitutional Right to a trial by jury. If that theory is followed a person may be convicted of any crime without a jury so long as he or she is placed upon probation not exceeding three (3) years. In other words as we view it the Solicitor-General feels that as long as a defendant charged is placed upon probation, it makes no difference whether he was originally tried with or without a jury, regardless of the crime, so long as the offense is not punishable by death or life imprisonment. With this reasoning we cannot agree. We think this court has laid down in *Cheff v. Schnackenberg*, 284 U.S. 373, 379, 379-380 (86 S. Ct. 1523), a clear, concise and fair statement with reference to when a jury is required. The very fact that the defendant was sentenced to three (3) years imprisonment shows beyond a doubt, that it is not a petty

offense. A petty offense has heretofore been defined and is found in 18 U. S. C. page 1.

The court here is concerned and presented with a constitutional question as to whether or not this petitioner had the right to a jury trial. He either did or did not have such right. Under the Constitution and the opinion above cited we believe clearly he had the right to a jury trial and this was denied him. The statutes and Constitution of Oklahoma regarding this subject are as follows:

Oklahoma Constitution, Article 2, Section 25 states:

The legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt; Provided, that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or entered by any court or judge of the State shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given.

The law of the State of Oklahoma provides as follows:

Title 2, Article 565, O. S. A. states:

Contempts of court shall be divided into direct and indirect contempts. Direct contempts shall consist of disorderly or insolent behavior committed during the session of the court and in its immediate view, and presence, and of the unlawful and wilful refusal of any person to be sworn as a witness, and the refusal to answer any legal or proper question: and any breach



of the peace, noise or disturbance, so near to it as to interrupt its proceedings, shall be summarily punished as hereinafter provided for. Indirect contempts of court shall consist of wilful disobedience of any process or order lawfully issued or made by a court; resistance wilfully offered by any person to the execution of a lawful order or process of a court.

R. L. 1910, 2277.

Article 566, O. S. A. states:

Punishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court.

Article 567, O. S. A. states:

In all cases of indirect contempt the party charged with contempt shall be notified in writing of the accusation and have a reasonable time for defense; and the party so charged shall, upon demand, have a trial by jury.

The last named article was amended by the legislature of the State of Oklahoma Sessions Laws, 1963, c55, Article 1, effective May 13, 1963, and reads as follows:

In all cases of indirect contempt the party charged with contempt shall be notified in writing of the accusation and have a reasonable time for defense. The party so charged shall upon demand, have a trial by jury.

In the event the party so charged shall demand a trial by jury, the court shall thereupon set the case for trial at the next jury term of said court and shall fix the amount of an appearance bond to be

posted by said party charged, which bond shall be signed by said party and two sureties together shall qualify by showing ownership of real property, the equal of which property shall be in double the amount of the bond, or, in the alternative, the party charged may deposit with the court clerk cash equal to the amount of the appearance bond.

In the case of *Ex parte Stevenson*, 89 Oklahoma Criminal, page 427, 209 Pacific Report 2nd Series, page 515, the court of Criminal Appeals of Oklahoma on Habeas Corpus used the following language:

A criminal contempt is an offense against the public or society by conduct that is directed against the dignity and authority of the court or judge, acting judiciously, obstructive of the administration of justice and disrespectful to the majesty of the state. 17 C. J. S., Contempt, p. 5, p. 7, *Ex parte Gudenoge*, 2 Oklahoma Cr. 110, 100 P. 39; *Flathers v. State*, supra; *Blanton v. State*, 31 Okl. Cr. 419, 239 P. 698, where in addition to making the foregoing classification this court pointed out that a civil contempt may be either direct or indirect and a criminal contempt may be either direct or indirect. Moreover, therein it was said:

"But the violation of an order not made for the benefit of any party to the litigation on the matter pending in the court is not a civil contempt, but is an act obstructive to the administration of justice and is a criminal contempt."

See also *Brown v. State*, Okl. Cr., 209 P. 2d 714, Direct Contempt is a crime; *Smythe v. Smythe*, 28 Okl. 266, 114 P. 257, and the punishment therein constitutes a sentence in a



criminal case; *Deskens v. State*, 62 Okl. Cr. 314, 71 P. 2d 502; *Cannon v. State*, 58 Okl. Cr. 451, 55 P. 2d 135.

In civil contempts the punishment by imprisonment is for the purpose of coercing the performance of an act compensatory or remedial for the benefit of the opposite party. In criminal contempts the primary purpose is punishment in vindication of public authority, the dignity of the court and the majesty of the state.

### **Conclusion**

Your Petitioner, therefore, most respectfully shows to the court that he may yet be required to serve the three (3) years in prison because he should do "some act or leave the judicial district or fail to report every Monday to the probation officer or fail to make a written report to the probation officer in Oklahoma City or fail to notify the probation officer if arrested or questioned by a law enforcement officer or if he should associate with any other person other than a law abiding person, and he is also required to maintain reasonable hours," which were not defined, and "reasonable hours" mean a lot of different things to a lot of different people. The petitioner was ordered to work regularly at a lawful occupation and if he couldn't secure work to notify the probation officer at once and he is required to consult with the probation officer prior to job changes. All these instructions, including not leaving the judicial district or changing his place of residence, were required on the conditions of probation. If he violated any, then it must be assumed that he will be required to serve three (3) years.

As we understand the contention of the Solicitor-General, if the petitioner had been required to serve the three (3) years he would have been entitled to a jury trial; since he was placed on probation he was not entitled to a jury trial. If this logic and reasoning is correct, then before a judge would know whether the defendant was entitled to a jury trial it would be necessary for him to determine in advance of the trial whether he would grant probation and how long the sentence would be. Of course this could not be done until the trial was heard. Consequently the question of entitlement to a jury trial could not be determined until after the trial, and this is wholly incorrect. The question of whether one is entitled to a jury trial must be determined and this court must lay down in plain language the test to be applied. See *Cheff v. Schnackenberg*.

We respectfully submit to the court that the cause should be reversed with instructions to grant our Petitioner a trial by jury.

Respectfully submitted,

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